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Nos. 95-1858 and 96-110

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DENNIS C. VACCO, ATTORNEY GENERAL OF NEW YORK, *et al.*,
Petitioners,

v.

TIMOTHY E. QUILL, *et al.*,
Respondents,

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

HAROLD GLUCKSBERG, *et al.*,
Respondents

On Writs of Certiorari to the United States Courts of Appeals for the Second and Ninth Circuits

BRIEF AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW & JUSTICE SUPPORTING PETITIONERS IN NOS. 95-1858 AND 96-110

KEITH A. FOURNIER
JOHN G. STEPANOVICH
THE AMERICAN CENTER
FOR LAW AND JUSTICE
1000 Regent Univ. Dr.
Virginia Beach, VA 23464
(757) 579-2489

THOMAS P. MONAGHAN
JOHN P. TUSKEY
NEW HOPE LIFE CENTER,
ACLJ-NEW HOPE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

JAY ALAN SEKULOW *
JAMES M. HENDERSON, SR.
WALTER M. WEBER
THE AMERICAN CENTER
FOR LAW AND JUSTICE
1000 Thos. Jefferson St.
Suite 304
Washington, D.C. 20007
(202) 337- 2273

* *Counsel of Record*

Attorneys for Amicus Curiae

36 pp

QUESTIONS PRESENTED

1. Should this Court invent a constitutional right, without support in either constitutional text, history, or tradition, that would prevent a state from prohibiting a person from hiring another to assist in committing suicide?

2. Does the Equal Protection Clause require states to treat identically the act of refusing possibly useless medical treatment or nutrition and hydration and the act of affirmatively requesting and providing assistance for the purpose of intentionally committing suicide?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—cont'd

TABLE OF AUTHORITIES—cont'd

TABLE OF AUTHORITIES—cont'd

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INTEREST OF AMICUS

The American Center for Law and Justice ("ACLJ") a national, non-profit, legal organization, and the ACLJ's human life litigation and education project, the New Hope Life Center, are devoted to safeguarding the sanctity of human life through education, litigation, legislative assistance, and related activities, and have advocated for the defense of human life in local, federal, and state courts. The ACLJ's Chief Counsel has argued several cases before this Court, including *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), and *Schenck v. Pro-Choice Network*, No.

95-1056 (argued October 16, 1996). In addition, the ACLJ has filed briefs as counsel for parties in several other cases before this Court, including *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994), and *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1996).

The ACLJ files this brief in support of the petitioners in both *Quill* and *Glucksberg* because the courts of appeals' holdings in those cases strike at the heart of the states' long-recognized duty to protect the sanctity of human life. The ACLJ supports the petitioners' contentions in both cases that state laws outlawing assisted suicide are fully consistent with the United States Constitution.*

SUMMARY OF ARGUMENT

1. The Ninth Circuit's decision that Washington's assisted suicide law is unconstitutional because the Due Process Clause creates a right to determine "how and when" to die is dangerously wrong for several reasons. *First*, Washington's law prohibiting assisted suicide rationally furthers the legitimate interest of protecting human life. *Second*, the asserted right has no basis in the Constitution's text or this nation's history and tradition. *Third*, a right to determine "how and when to die" based on the broad, existentialist notion of liberty defined in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), is not susceptible to principled limitation. If liberty is the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" such that the

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*. The parties in both cases have consented to the filing of this brief. Letters of consent are being filed with the Clerk of this Court.

Constitution protects self-defining "intimate and personal choices," *id.* at 851, then liberty must include the right to kill oneself, to have a doctor's or somebody else's help in killing one's self, or to have a doctor or somebody else actually do the killing. All of these involve "intimate and personal choices" concerning a person's "concept of existence." But, if liberty is broad enough to include all these choices concerning how and when to die, then it must be broad enough to encompass many other "intimate and personal decisions." Adopting *Casey's* existentialist notion of liberty as a generally-governing constitutional standard would lead to claims of right to use drugs, and to engage in polygamy, fornication, adultery, divorce, sodomy, bestiality, and consensual sadism. If a person has a constitutional right to have somebody kill him, how can he not have a constitutional right to allow somebody to inflict pain and injury on him?

Casey's existentialist notion of liberty provides no principled basis for distinguishing which of these acts to approve and which to disapprove. Extending that notion of liberty will lead to one of two results: either the courts will require states to approve of much conduct the states may reasonably desire to prohibit as harmful, in effect imposing a constitutionally-mandated moral philosophy on the states; or the courts will arbitrarily pick and choose which activities the states may prohibit, and which activities the states must allow. In effect, the courts will become superlegislatures passing on the wisdom of state laws. This would be a rerun of *Lochner v. New York*, 198 U.S. 45 (1905), which imposed a constitutionally mandatory economic philosophy on the states, and established the courts as the final arbiters concerning the wisdom of state laws touching on "economic liberty."

To avoid these dangers, this Court should either overrule *Casey* or decline to extend *Casey's* definition of liberty. There is good reason to think that *Casey's* authors did not intend a radical extension of *Casey's* definition of liberty to uphold alleged rights like the right to assisted suicide. First, the Court in *Bowers v. Hardwick*, 479 U.S. 186 (1986), rejected a similar notion of liberty put forth to establish a right to commit homosexual sodomy; nothing in *Casey* purports to overrule *Bowers*. Second, the *stare decisis* concerns *Casey* found controlling do not exist in this case. Therefore, this Court should refuse to extend *Casey's* definition of liberty to create a right to assisted suicide.

2. The Washington and New York laws prohibiting assisted suicide do not violate the Equal Protection Clause. Suicide is an act performed for the purpose of causing one's death. By definition, those who are affected by the Washington and New York laws are seeking assistance for the very purpose of killing themselves. Since a state may conclude rationally that suicide is wrong and ought to be prohibited, a blanket prohibition of assisted suicide is rational.

However, persons seeking withdrawal of medical treatment or medically-assisted hydration and nutrition are not necessarily committing suicide. Some are, but many if not most are acting for morally licit reasons – for example, to avoid unduly burdensome or possibly useless bodily intrusions – and only accept death as a known but unintended side effect of that decision. To prohibit all decisions to withdraw medical treatment or medically-assisted hydration and nutrition would further the goal of preventing suicide, but would also sweep in much conduct aimed not at directly causing death but at alleviating needless burdens and suffering, conduct that is not

suicide. A state may rationally conclude that the benefits of preventing suicides outweigh the burdens to those not committing suicide; but the state also could rationally conclude that the burdens outweigh the benefits, and decide not to prohibit withdrawals of medical treatment or medically-assisted hydration and nutrition. Since the state has a rational basis for distinguishing these cases from direct, active, assisted suicide, the state may treat the two situations differently.

ARGUMENT

I. THE EXISTENTIALIST NOTION OF LIBERTY POSITED IN THIS COURT'S ABORTION JURISPRUDENCE IS FAR TOO SWEEPING TO SERVE AS A GENERAL RULE FOR CONSTITUTIONAL ADJUDICATION AND OUGHT NOT BE EXTENDED TO CREATE A RIGHT TO ASSISTED SUICIDE.

A. Neither Constitutional Text, Tradition, nor History Support any Fundamental Right to Assisted Suicide.

Ever since repudiating the substantive due process approach of *Lochner v. New York*, 198 U.S. 45 (1905), this Court generally has limited its review of most state laws under the Due Process Clause to determine only whether those laws rationally serve a legitimate state objective. See, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Bowers v. Hardwick*, 478 U.S. 196 (1986). Certainly, protecting human life is a legitimate government end. That was the view of this nation's founders, who wrote in our founding document that one of the reasons

governments are founded is to secure the "unalienable" right to life. Declaration of Independence, para. 2 (U.S. 1776). Prohibiting assisted suicide rationally furthers this end. Besides helping to preserve the potential suicide's life, a ban on assisted suicide helps to, among other things, "preserve the moral ecology" in a community by preventing bad example which others may emulate, while "educat[ing] people about moral right and wrong" (in this case, the moral "right" of protecting human life and the moral "wrong" of killing). See Gerard V. Bradley, *Pluralistic Perfectionism: A Review of* Making Men Moral, 71 Notre Dame L. Rev. 671, 681 (1996) (reviewing Robert P. George, *Making Men Moral* (1993), and discussing George's argument concerning the legitimate ends served by so-called "morals laws").

Of course, this analysis depends on a state's authority to accept and apply the proposition "suicide is wrong (or harmful)" as a governing proposition for lawmaking. Certainly this proposition is rational (unless one is prepared to dismiss this nation's entire legal history and tradition concerning suicide as irrational). But the respondents in these cases, in effect, seek to deny the states the authority to accept and apply this proposition by positing that the due process clause creates a "fundamental right" to assisted suicide that the state may infringe only upon showing that the infringement is narrowly tailored to serve a "compelling state interest." See *Reno v. Flores*, 507 U.S. 292, 301-03 (1993).

As the Second Circuit correctly observed, the right to suicide, assisted or otherwise, (like the right to "economic liberty" or "freedom of contract" found in *Lochner*) appears nowhere in the Constitution's text. *Quill v. Vacco*, 80 F.3d 716, 723 (2d Cir. 1996). It is true that this Court has granted

heightened protection to "rights" that do not appear in the Constitution's text. The danger in this approach, however, is that it puts the Court in the same position that it occupied during the *Lochner* era–that of a superlegislature substituting its notion of wise public policy for that of the people's elected legislators. Thus, this Court has noted that it "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986); see also *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion).

Because of this danger, this Court generally "has been reluctant to expand the concept of substantive due process." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). To limit the proliferation of judge-made rights, this Court has granted heightened protection only to those asserted freedoms that are "'implict in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'" *Bowers*, 478 U.S. at 191-92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). In determining what asserted freedoms are "implicit in the concept of ordered liberty," the Court generally has turned to history and tradition, according fundamental status only to those asserted freedoms "deeply rooted in this nation's history and tradition." *Id.* at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.)); see also *Michael H.*, 491 U.S. at 122 (fundamental liberties are those "traditionally protected by our society"); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Due Process Clause grants only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental").

This Court's reliance on history and tradition is at bottom an act of profound judicial humility that serves the end of collective self-government. For the Court to assert without fairly explicit textual support that the Constitution affords fundamental protections to activities that the people and their elected legislators historically have restricted or even prohibited would negate the people's authority to govern themselves by laws of their own making.

As the Second Circuit recognized in *Quill,* 80 F.3d at 724-25, and as Justice Scalia demonstrated in his concurring opinion in *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261, 292-95 (1989), the asserted right to commit suicide, on which the derivative right to assisted suicide depends, flunks the history and tradition test. This brief will not rehash the two cases' discussions. It suffices to say that the English Common Law received in this country prohibited assisted suicide, and the states generally have felt free, both before and after the Fourteenth Amendment's ratification, to prohibit suicide, attempted suicide, and assisted suicide. See *Cruzan*, 497 U.S. at 294-95 (Scalia, J., concurring); *Quill*, 80 F.3d at 724. See generally Thomas Marzen, et al., *Suicide: A Constitutional Right?,* 24 Duq. L. Rev. 1 (1985).[1]

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1. Unlike Justice Scalia in *Cruzan,* the Second Circuit in *Quill*, and the majority of the original panel in *Glucksberg,* the majority of the en banc Ninth Circuit found the historical record "checkered." *Compassion in Dying v. Washington,* 79 F.3d 760, 806 (9th Cir. 1996) (en banc). We leave to the petitioners and other amici the task of refuting in detail the Ninth Circuit's peroration on the philosophical and theological history of suicide in western culture. We note only that the Ninth Circuit's discourse is largely tendentious (particularly in its treatment of Christian teaching about suicide, and most notably its ridiculous assertion that the New Testament treats Judas' suicide as an act of *repentance)* and, in any event, beside the point. Certainly, the Second Circuit in *Quill* was not impressed by Judge Reinhardt's historical scholarship.

B. The Definition of "Liberty" Stated in *Planned Parenthood v. Casey* Should Not be Extended to Create a Right to Assisted Suicide.

That the asserted right to assisted suicide appears nowhere in the Constitution's text and fails the test of history and tradition ought to be a sufficient reason to reject that "right" as one entitled to heightened constitutional protection. The Second Circuit correctly reached that conclusion. See *Quill,* 80 F.3d at 724-25.

Unfortunately, adherence to history and tradition have not always marked this Court's course when deciding to create non-textual constitutional rights entitled to special protection. The primary area in which this Court largely has abandoned its usual caution in creating such rights is the area of abortion. In *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973) this Court overturned all fifty states' abortion laws by finding a right to abortion throughout nine months of pregnancy, despite the fact that neither constitutional text nor our nation's history and tradition supported such a right. *Roe* premised the abortion right on a more general "right to privacy" in childbearing decisions that it culled from earlier cases, particularly, *Griswold v. Connecticut*, 381 U.S. 479 (1965).[2]

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2. Neither *Griswold* nor any of its predecessor cases (for example, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)) support the right created in *Roe*. All those cases were aimed at protecting the integrity of the family *unit,* not some general individual right to make decisions concerning child bearing. *Griswold,* which struck down a Connecticut law prohibiting married couples' *use* of

This Court subsequently reaffirmed what it held to be *Roe's* "central holding" in *Planned Parenthood v. Casey,* 505 U.S. 833 (1992). *Casey* grounded the abortion right on the Due Process Clause guarantee of liberty, see *id.* at 846-53, which it defined in relation to the Court's abortion, contraception, and familial privacy cases as follows:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the right to bear or beget a child." Our precedents "have respected the private realm of family life which the state cannot enter." These matters, *involving the most intimate*

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contraceptives, was premised expressly on the need to protect the privacy that the good of marital intimacy requires, and the damage to that privacy that Connecticut's ban on contraceptive use could do. See 381 U.S. at 484-86 (opinion of the Court); *id.* at 493-96 (Goldberg, J., concurring); *id.* at 507 (White, J., concurring). See also *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting). Tellingly, Justice Harlan's dissent in *Poe* distinguished Connecticut's contraceptive ban, which he said unconstitutionally imposed on the goodof marital intimacy, from subjects such as abortion, euthanasia, and suicide, which he said statescould restrict. See *Poe,* 367 U.S. at 545-53 (Harlan, J., concurring). For more extended discussion of the transmogrification of the marital/familial privacy right recognized in *Griswold* into the individual right created in *Roe*, see David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court* 75 Marq. L. Rev. 975, 1059-64 (1992); Gerard V. Bradley, Life's Dominion: *A Review Essay,* 69 Notre Dame L. Rev. 329, 350-58 (1993); David Wagner, *The Family and American Constitutional Law*, 1 Liberty, Life& Fam. 145,157-67 (1994).

> *and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.*

Id. at 851 (citations omitted; emphasis, except for "*individual*," added).

Casey's conception of liberty formed the linchpin of the Ninth Circuit's decision in *Glucksberg.* The Ninth Circuit en banc majority seized on the italicized language quoted above and concluded that, because "the decision how and when to die 'is one of the most intimate and personal choices a person may make in a lifetime'" that decision "[s]urely...implicates a most vital liberty interest." *Compassion in Dying v. Washington*, 79 F.3d 790, 813-14 (9th Cir. 1996) (en banc). The Ninth Circuit held that no asserted interest justified the state in prohibiting "competent, terminally ill adults" from seeking a physician's assistance in committing suicide. *Id.* at 840.

Admittedly, the Ninth Circuit's extension of *Casey* has a surface logic. If liberty *really* means, as a general constitutional rule, "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," then what the Court recognized in *Casey* is nothing less than a constitutional right to creat[e] one's own moral universe. In fact, the very word "autonomy," which the quoted passage from *Casey* expressly ties to "the liberty protected by the Fourteenth Amendment," 505 U.S. at 851,

"derives from the Greek 'auto' for self and 'nomos' for law, so that it can be literally defined as being a law for, or unto, oneself." David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 Marq. L. Rev. 975, 981 (1992) (citing I *Oxford English Dictionary* 807 (Clarendon Press, 2d ed. 1969)). If *that* is liberty, how can liberty *not* include the right to commit suicide (or as the Ninth Circuit delicately put it, the right to choose "how and when one dies") even with a physician's assistance (or anybody else's assistance, for that matter)?

The Court should resist this logic. *Casey* appears to say that unconstrained choice "define[s] the attributes of personhood." *Casey*, 505 U.S. at 851. If so, then *Casey* has made Jean-Paul Sartre's existentialist philosophy this nation's constitutionally-mandated moral philosophy. The existentialists taught that the human person creates and defines himself by the choices he makes, as summed up in the slogan "existence precedes essence." Jean-Paul Sartre, *Existentialism* 15 (Bernard Frechtman trans., 1947). In other words, choosing is more important than being. Thus, in the existentialist view, "freedom is characterized by a constantly renewed obligation to remake the *Self*," an obligation fulfilled by making self-defining and self-creating choices. Jean-Paul Sartre, *Being and Nothingness* 34-35 (Hazel E. Barnes trans. 1956). See generally Smolin, *The Jurisprudence of Privacy*, 75 Marq. L. Rev. at 980-84.

Of course, the Constitution no more enacts M. Jean-Paul Sartre's *Existentialism* as this nation's governing moral philosophy than it enacted "Mr. Herbert Spencer's Social Statics" as the nation's governing economic philosophy. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting). In any event,

making *Casey's* existentialist definition of liberty the generally governing constitutional standard would have consequences the *Casey* Court may well not have foreseen. For instance, it reasonably follows from tying "the attributes of personhood" to the ability to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," *Casey*, 505 U.S. at 851, that the inability to make this self-definition must be the antithesis of personhood. If so, those without sufficient cognition to make this self-definition are not persons. Since protection under the Fourteenth Amendment's Equal Protection and Due Process Clauses depends on one's status as a "person," the notion that personhood depends on cognition sufficient to allow a being to define his own concept of existence throws considerable doubt on the constitutional status of infants, small children, the mentally retarded, the mentally ill, the mentally incompetent, the comatose, and the unconscious. The joint opinion's notion of personhood as the ability for self-definition through conscious choice echoes the writings of ethicists who have excluded from the ranks of personhood those who lack what the ethicists judge to be sufficient rationality and self-consciousness.[3]

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3. See, e.g., Joseph Fletcher, *Indicators of Humanhood: A Tentative Profile of Man*, 2 Hastings Center Rep. (Nov.1972) (adopting, among other criteria for humanity, self-awareness, ability to communicate, and a minimum IQ of 20, and questioning the humanity of anyonewith an IQ less than 40); Peter Singer, *Practical Ethics* 76, 97 (1979) (proposing that a "person" is a rational and self-conscious being: "So it seems that killing, say a chimpanzee is worse than the killing of a gravely defective human who is not a person"). See generally William Brennan, *Dehumanizing the Vulnerable* 152-56 (1995) (collecting the similar views of other ethicists). See also Bradley, Life's Dominion, 69 Notre Dame L. Rev. at 374-80 (summarizing and critiquing Ronald Dworkin's view of personhood and the

Moreover, a right to assisted suicide based on *Casey's* notion of liberty would be impossible to limit in any principled way. *Glucksberg* and *Quill* concerned the right of "terminally ill" competent adults to receive a physician's assistance in committing suicide. But why limit the right to terminally-ill patients? What of the quadriplegic, consigned to life in a wheelchair? What of the person consigned to suffer lifelong pain from a condition that will not kill him? How much physical suffering and pain are too little to justify a right to suicide? And why are federal courts, including this Court, more competent than the people's elected representatives to make that decision?

An even more basic question arises: If liberty is "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," why should the assisted suicide right be limited by life expectancy or physical or emotional pain and suffering? "To be, or not to be"[4] would seem to be the fundamental decision *any* person would face in defining his own "concept of existence." If *Casey's* notion of liberty does include the right to define one's own concept of existence, an assisted suicide right based on *Casey* "must be the prerogative of at least every sane adult." *Compassion in Dying v. Washington*, 49 F.3d 586, 591 (1995). See generally Yale Kamisar, *The Reasons So Many People Support Physician-Assisted Suicide–and Why These Reasons are not Convincing*, 12 Issues in Law & Med. 113, 128-30 (1996).

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morality of killing).

4. William Shakespeare, *Hamlet*, act 3, sc.1 (Harvard Classics, Charles W. Elliott ed. 1938).

Moreover, a right to physician-assisted suicide would inevitably become a right to physician-administered voluntary euthanasia in some cases. Even the en banc Ninth Circuit recognized that physicians or their agents might have to actually kill the patient when the patient cannot kill himself. *Compassion in Dying v. Washington*, 79 F.3d 790, 832 (9th Cir. 1996) (en banc).[5] While the Ninth Circuit speculated that the Constitution might treat such voluntary euthanasia differently than physician-assisted suicide, the court candidly acknowledged that the key question is not who kills the patient, but rather who decides to kill. *Id.* at 831-32. This reflects the existentialist notion that the ability to choose consciously is the essence of personhood and liberty. If this notion controls, it would be arbitrary to confine to those who can pull the trigger or administer the deadly potion themselves the right to define their own "concept of existence" by ending that existence. It would be just as arbitrary to confine that right to those who choose to pay a physician to administer the means of death. If the *choice* to die is what matters, how can a court reasonably limit the choice to being killed by a doctor?

This raises the spectre that the Constitution could mandate that the victim's consent be a defense to homicide. The law generally has not regarded consent to be a complete defense to

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5. The Ninth Circuit refused to call this act of killing another "euthanasia," preferring instead to categorize this act along with assisted suicide as "volitional death." See 79 F.3d at 832 & n.120. However, there is no other more proper term for this killing: "euthanasia" *means* "the action of killing an individual for reasons considered merciful." *The American Heritage Dictionary* 469 (2d College ed. 1991). The Ninth Circuit's word play is itself a form of killing–"the murder of a word," which C.S. Lewis called "verbicide." C.S. Lewis, *Studies in Words* 7 (2d ed. 1967).

homicide. See Wayne R. LaFave and Austin W. Scott, *Handbook on Criminal Law* § 57, at 408 (1972). But if doctors are immune from homicide charges for executing a patient's request to be killed, why should not other "angels of mercy" be similarly immune (or at least able to raise consent as a defense at trial)? One might object that such a consent defense would raise evidentiary problems that might not arise when physicians perform voluntary euthanasia. Even if this were true, states could overcome those evidentiary problems by means other than completely prohibiting nonphysicians from performing voluntary euthanasia. Cf. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1989) (upholding a Missouri law requiring "clear and convincing" evidence of an incompetent's wishes before authorizing withdrawal of hydration and nutrition). To ban nonphysicians other than doctors from killing a consenting victim would under the existentialist view arbitrarily limit the ability of a person who cannot afford or does not desire *physician*-assisted death to define his own concept of existence by choosing to end that existence as *he* sees fit.

Connecticut v. Menillo, 423 U.S. 9 (1975) (per curiam), which held that *Roe v. Wade* did not prevent states from enforcing criminal abortion statutes against nonphysicians, is not to the contrary. *Menillo* was premised on the state's interest in preserving maternal health; abortion by physicians is likely to be safer for the mother than abortion by nonphysicians. *Id.* at 10-11. This does not distinguish euthanasia by physicians from killing by nonphysicians. While it may take some medical expertise to perform an operation that kills an unborn child while leaving the mother unharmed (or at least alive), it takes no medical expertise to put a gun to

somebody's head and pull the trigger, or perform the sundry other acts that would kill another.

Some might suggest preventing unnecessary pain as a reason for allowing only doctors to kill. But this aesthetic concern provides no reason to limit a person's right to choose a violent and painful death if that person really has a right to choose "how and when" he dies, *Compassion in Dying*, 79 F.3d at 838, based on a right to define his "own concept of existence, of meaning, of the universe, and of the mystery of human life." Self-loathing is as much a concept of existence and meaning as self-love. One person chooses a painless death; another chooses a painful death; *Casey's* definition of liberty implies that the state is not competent to judge the relative merits of the concepts of existence and meaning that led to those choices.

Finding principled limits to *Casey*-style liberty is not confined to the problem of limiting a right to assisted suicide. Adopting *Casey's* existentialist definition of liberty as a general constitutional standard will inevitably lead to claims of right to engage in sundry other activities besides suicide. These activities could well include drug use, polygamy, fornication, adultery, divorce, prostitution, sodomy, bestiality, and consensual sadism. All these can be said to be "intimate and personal choices" that arise from the person's "concept of existence, of meaning, of the universe, and of the mystery of human life." State prohibitions of these activities would prevent those who would choose to engage in these activities from "defin[ing] the attributes of [their] personhood" as surely as state prohibition of assisted suicide.

Some would scoff at this "parade of horribles." But a "reading of 'the right to define one's own concept of existence'

language broad enough to cover assisted suicide would be broad enough to cover a great many other things. It would surely cover the autonomy of sexual activity and relationships, and it would do so more easily than it would embrace assisted suicide." Yale Kamisar, *Against Assisted Suicide–Even a Very Limited Form*, 72 U. Det. Mercy. L. Rev. 735, 767 (1995).

Take divorce, for example. Certainly, the choice to marry is among "the most intimate and personal choices a person may make in a lifetime." *Casey* 505 U.S. at 851. But the choice to *dissolve* one's marriage also is an intimate and personal choice. Taking *Casey* at its word, and accepting that liberty involves the right to "define the attributes of personhood" by making such choices, a right to divorce necessarily follows. Indeed, Kenneth Karst, applying a supposed right to "intimate association" that is similar if not identical to *Casey's* notion of liberty as the right to unconstrained choice, concluded in 1980 that a constitutional right to no-fault divorce exists. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L .J. 624, 637-38, 671-72 (1980); see also Smolin, *The Jurisprudence of Privacy*, 75 Marq. L. Rev. at 984 (discussing Karst's theory of intimate association).

As another example, suppose Timmy's "concept of existence, of meaning, of the universe" leads him to conclude that he should "marry" Lassie. If *Casey* meant what it said about liberty, how could the state interfere with Timmy's self-defining choice to pursue this "intimate association"? One might say that our society traditionally has prohibited bestiality. But our society traditionally has prohibited abortion and suicide as well. See Robert M. Byrn, *An American Tragedy: The Supreme Court and Abortion*, 41 Fordham L. Rev. 807, 814-35 (1973) (discussing the history of abortion

prohibition); *Quill v. Vacco*, 80 F.3d 716, 724 (2d Cir. 1996) (discussing historical prohibition of suicide). One might say the state may act to prevent harm to Timmy. But that would be a strange basis for regulating Timmy's conduct with Lassie when Timmy has the right to kill himself or have himself killed.[6] One might say the state may act to prevent harm to Lassie. But that would be an absurd basis for upholding the state's action: the state may prohibit bestiality to prevent harm to animals, but may not prevent humans from harming or even killing themselves (or allowing others to harm or kill them). Moreover, if *Casey's* conception of liberty prevents the state from prohibiting the destruction of a being that is likely a human being, how can that conception of liberty allow a state to prevent a person from having "intimate relations" with a dog?

These examples demonstrate that establishing *Casey's* existentialist definition of liberty as a general constitutional standard could require states to allow conduct the states may well desire to prohibit as harmful, and that the states traditionally have had the authority to prohibit.[7] This, in effect,

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6. This would also seem to preclude prohibitions of consensual sadism. If somebody has the constitutional right to allow another to kill him, on what basis may the state prohibit that person from allowing another to inflict pain on him?

7. *Casey's* notion of liberty may also put in doubt the constitutionalty of such mundane laws as laws requiring automobile passengers to wear seat belts or motorcycle riders to wear helmets, as well as other laws, such as consumer protection laws and FDA regulations, that restrict autonomous choice. *My* concept of meaning requires me to live dangerously; under *Casey*, who is the state to tell me I cannot choose to live dangerously when the state cannot prevent me from intentionally killing myself?

would impose a radical constitutionally-mandated moral philosophy–existentialism–on the states. This is a rerun of *Lochner*, which imposed a constitutionally-mandated economic philosophy on the states. Jean-Paul Sartre's *Existentialism* simply replaces Mr. Herbert Spencer's Social Statics as the Court's mandated philosophy of choice.

Of course, recognizing a right to assisted suicide based on *Casey's* existentialist notion of liberty may not inevitably lead the Court to invalidate laws prohibiting or "unduly" restricting divorce, bestiality, or consensual sadism (or laws prohibiting other consensual activities the law traditionally has prohibited). The Court could reject all these claims or accept some or reject others. It could decide to impose certain "reasonable" conditions on the exercise of choice concerning these matters. But an existentialist notion of liberty as the right to unconstrained choice concerning intimate and personal matters provides no principled grounds for making these decisions. Decisions will necessarily rely on ad hoc and essentially arbitrary judgments: Which decisions are "personal and intimate" enough to fall within *Casey's* definition of liberty? Are some people's concepts "of existence, of meaning, of the universe, and of the mystery of human life" more or less worthy than others? When are the state's or society's interests sufficient to justify constraining choice given the importance the Court sees in the asserted choice?

This ad hoc process would significantly intrude on the people's right to collective self-government. The process would establish the courts as superlegislatures, passing not only on the constitutionality of states' laws, but also–as can be seen from the questions the courts must consider–on those laws' wisdom. Courts, not elected legislators subject to the people's

ultimate control, will decide which laws the people shall be governed by, despite the lack of any express basis for decision in constitutional text or our nation's tradition, and despite the fact that courts are no better situated or qualified to weigh the competing interests at stake.

This is the vice that infected *Lochner's* substantive due process approach. Contrary to popular perception, during the *Lochner* era, "most challenged laws withstood attack." Gerald Gunther, *Constitutional Law* 445 (12th ed. 1991). Yet, *Lochner* represented a significant intrusion on collective self-government precisely by imposing on the states an economic philosophy found nowhere in the Constitution. *Lochner* thus established the courts, and not the states' legislatures, as the ultimate arbiters concerning laws that were reasonable exercises of the states' traditional authority.

To avoid these dangers, the Court should not extend *Casey's* definition of liberty outside the context in which it appeared to create a right to assisted suicide. Of course, one might say that a decision not to so extend *Casey* is itself arbitrary since this Court's abortion jurisprudence suffers from the *Lochner*-style flaws we have just outlined. See generally *Casey*, 505 U.S. at 979-1002 (Scalia, J., dissenting). Therefore, overruling *Casey* would be the most principled way to stanch the dangers that flow from its existentialist notion of liberty. But if the Court is unwilling to overrule *Casey*, "[t]he device of compartmentalizing precedent is an old jurisprudential strategy for limiting unruly doctrines." Kamisar, *Against Assisted Suicide*, 72 U. Det. Mercy L. Rev. at 764. Nothing requires a court to extend bad doctrine further than that doctrine already extends.

In any event, there is good reason to think that the *Casey* joint opinion's authors did not intend for *Casey's* definition of liberty to become a general constitutional standard. As noted, one would expect a definition of liberty as broad as that in *Casey* to encompass the choice to engage in consensual sodomy. In fact, *Casey's* definition of liberty mirrors Justice Blackmun's argument in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that the Constitution protects a person's right to engage in homosexual sodomy. Compare *Casey*, 505 U.S. at 851 with *Bowers*, 478 U.S. at 204-06. See generally Smolin, *The Jurisprudence of Privacy*, 75 Marquette L. Rev. at 981-84. The Court in *Bowers* rejected Justice Blackmun's argument. Yet, nothing in *Casey* purports to overrule *Bowers*.

Moreover, *Casey* expressly relied on the principle of *stare decisis*, as well as the broad definition of liberty, as reasons for affirming *Roe's* "central holding." See 505 U.S. at 853 ("the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*"). No previous case of this Court has ever recognized a right to assisted suicide. Therefore, no *stare decisis* concerns exist in this case.[8]

If the Court does not extend *Casey's* definition of liberty, the asserted right to assisted suicide depends for its existence on constitutional text and tradition. As we have shown, neither

8. This is not to say we that agree with *Casey's* application of *stare decisis*, for, in fact, we do not. See, e.g., Jay Alan Sekulow & John Tuskey, *The "Center" is in the Eye of the Beholder*, 40 N.Y. L. Sch. L. Rev. 945, 961-62 (1996). But that does not affect the fact that the *stare decisis* concerns the majority thought controlling in *Casey* do not exist in this case.

text nor tradition support that right. Therefore, the Ninth Circuit's decision creating a right to assisted suicide under the Due Process Clause cannot stand.[9]

II. THE STATE MAY RATIONALLY DISTINGUISH BETWEEN ASSISTED SUICIDE AND REFUSAL OF LIFESAVING TREATMENT OR MEDICALLY-ASSISTED NUTRITION AND HYDRATION; THEREFORE, LAWS TREATING THE TWO SITUATIONS DIFFERENTLY DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The Second Circuit properly rejected the argument that the Due Process Clause creates a right to assisted suicide. *Quill*, 80 F.3d at 724-25. But the Second Circuit held that New York's law prohibiting assisted suicide violated the Equal Protection Clause. *Id.* at 725-31. Essentially, the court found no rational basis for New York to prohibit assisted suicide while allowing withdrawal of life-sustaining treatment and medically-assisted

9. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) does not require a different result. In *Cruzan*, the Court merely assumed "that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Id.* at 279. Even this assumption was dictum, since *Cruzan* involved an incompetent patient allegedly in a persistent vegetative state. *Id.* at 265. In any event, the Court based its assumption not on any broad existentialist notion of liberty (though such a notion was implicit in the Court's abortion cases, and explicit in Justice Blackmun's *Bowers* dissent, neither of which the Court cited) but rather on cases establishing a person's right to refuse unwanted invasions of his body. See *id.* at 278-79; *id.* at 287-89 (O'Connor, J., concurring). Moreover, in assessing the state's interest in protecting human life, the Court noted approvingly the existence of state laws prohibiting assisted suicide, in no way suggesting such laws might violate the Constitution. *Id.* at 280.

hydration and nutrition. In both cases, according to the Second Circuit, New York allows patients to kill themselves with a doctor's assistance. See *id.*

While the Second Circuit correctly applied rational basis analysis to the New York law because because since neither a fundamental right nor a suspect class are involved in this case, *Heller v. Doe,* 509 U.S. 312, 319 (1993), the Second Circuit erred in both its premise and its conclusion in applying this analysis. Not all (and probably a small minority of) decisions to refuse life-sustaining treatment are suicide; therefore, it is rational to prohibit assisted suicide while at the same time allowing patients to refuse or request withdrawal of life-sustaining treatment.

Suicide is an act performed for the *purpose* of directly causing one's death. But a rational moral distinction exists between suicide and certain acts done with the *knowledge* that death is likely, or even inevitable. For example, a man lying on the railroad tracks waiting for the 9:00 express to put him out of his misery is committing suicide. But a man who sees the train bearing down on his son and rushes onto the tracks to save his son's life knowing full well that he will probably lose his own life in the process is not committing suicide. Nobody would suggest that it is irrational for one who believes suicide is wrong to think of the first act as immoral and the second act as morally permissible.

The people affected by Washington's and New York's assisted suicide prohibitions are by definition seeking assistance for the very purpose of killing themselves. They are, morally speaking, in the first man's position; they are intentionally seeking death. On the premise that suicide is

wrong, no moral gray area exists. Since the state may conclude rationally that suicide is wrong and ought to be prohibited (see *supra*, p.), a blanket prohibition of assisted suicide is rational.

But not all those who refuse or seek withdrawal of medical treatment or medically-assisted nutrition and hydration are intentionally choosing death. Admittedly, some are; but many, if not most people refusing medical treatment "would only be accepting death as a side effect of a choice to give up expensive, possibly useless treatment." Gerard V. Bradley, *Pluralistic Perfectionism: A Review Essay of* Making Men Moral, 71 Notre Dame L. Rev. 671, 684 (1996). This holds even for a decision to refuse medically-assisted nutrition and hydration. As the United States Catholic Bishops noted, "we should not assume that all or most decisions to withhold or withdraw medically assisted nutrition and hydration are attempts to cause death." *Statement of the USCC Committee for Pro-Life Activities*, 24 Origins 705 (1992). As the Bishops recognized, the patient may be facing imminent death anyway, so that his condition, and not lack of nutrition or hydration, will probably kill him; or, the patient may be acting not for the purpose of killing himself, but for the purpose of avoiding a procedure "of limited usefulness to the patient or unreasonably burdensome for the patient and the patient's family or care giver." *Id.*

Those who refuse or seek withdrawal of medical treatment or medically-assisted hydration and nutrition for a reason other than to kill themselves are, morally speaking, in a similar position to the man who ran onto the tracks to save his son, knowing he would likely die in the rescue. They are not committing suicide; they are only accepting death as a side effect of what may well be a morally licit action. See *id.* ("This

kind of decision should not be equated with . . . suicide"). It is entirely consistent with the principle that suicide is wrong to allow these people to refuse medical treatment or medically-assisted hydration and nutrition.

But what of those who refuse medical treatment or medically-assisted hydration and nutrition for the purpose of killing themselves? Admittedly, such refusal would be suicide. But this does not mean that it is irrational for the state to treat all refusals of medical treatment or medically-assisted hydration and nutrition, as a class, differently than it treats assisted suicide by active means.

It makes sense to prohibit all assisted suicides because all who seek assisted suicide are acting specifically to kill themselves. But the question becomes more subtle when speaking of decisions to withdraw life-sustaining treatment or medically-assisted food and hydration because while some people making this decision intend to commit suicide, many if not most people making this decision do not intend to commit suicide; they merely accept death as a side effect of their action. A state operating under the governing principle that suicide is wrong has several possible rational alternatives. The state could prohibit all withdrawal of life-sustaining treatment. This approach would succeed in vindicating the state's conclusion that suicide is wrong and ought to be banned, but at the cost of prohibiting much behavior that is not suicide. One might conclude that given the legitimate interest a person has in refusing unduly burdensome and potentially useless treatment, this cost is too great.

Second, the state could examine each case to determine which withdrawals of treatment really are suicide and which are

not, and restrict or punish those withdrawals that amount to suicide. But error in assessing "what is, after all, the silent operation of the mind," Bradley, *Pluralistic Perfectionism*, 71 Notre Dame L. Rev. at 684, could lead the state to punish acts that really are not illicit killing. This possibility, in turn, could deter the withdrawal of unduly burdensome and potentially useless treatment when such withdrawal would be justified. It would thus be rational for the state to recognize the limited ability of the law and those who must apply the law to make subtle judgments about the subjective reasoning process, and decide not to pursue this case-by-case approach.

Rejecting those first two options, the state could rationally adopt a third option: do not prohibit withdrawal of lifesaving treatment. That would allow some behavior that amounts to suicide. But it would also avoid the cost of prohibiting or deterring morally licit behavior and prevent the law from becoming embroiled in subtle judgments about intent. A rational person could consider the costs of the first two approaches to outweigh their benefits, and thus settle on this third approach as a reasonable resolution.

Thus, a state adhering to the general proposition that suicide is wrong could rationally decide to prohibit assisted suicide and at the same time allow patients to refuse or request withdrawal of life-saving treatment or medically-assisted hydration and nutrition. That decision requires weighing the costs and benefits of alternative courses of action against the states's paramount interest in protecting human life. In short, that decision is quintessentially a legislative decision; it is not the federal courts' domain.

To reject a state's decision in this area would require courts

either to reject the state's right to adopt a mode of moral reasoning that allows one to make distinctions based on the actor's purpose in acting (which would put much established criminal and tort law in constitutional jeopardy) or to reject the state's balancing of the various interests and related costs and benefits involved. Courts would either have to impose a constitutionally-mandated moral philosophy on the states, or courts would have to judge expressly the wisdom of the state's decision. In either event, courts would unduly infringe legitimate state prerogatives and the people's right to collective self-government. *Lochner*-style judicial second guessing would again rear its ugly head, except this time by way of the Equal Protection Clause rather than the Due Process Clause. The Equal Protection Clause does not require this result.

CONCLUSION

For the reason stated above, this Court should reverse both the Ninth Circuit's decision in *Glucksberg* and the Second Circuit's decision in *Quill*.

Respectfully submitted,

KEITH A. FOURNIER
JOHN G. STEPANOVICH
THE AMERICAN CENTER
FOR LAW AND JUSTICE
1000 Regent Univ. Dr.
Virginia Beach, VA 23464
(757) 579-2489

THOMAS P. MONAGHAN
JOHN P. TUSKEY
NEW HOPE LIFE CENTER,
ACLJ-NEW HOPE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

JAY ALAN SEKULOW *
JAMES M. HENDERSON, SR.
WALTER M. WEBER
THE AMERICAN CENTER
FOR LAW AND JUSTICE
1000 Thos. Jefferson St.
Suite 304
Washington, D.C. 20007
(202) 337- 2273

* *Counsel of Record*

Attorneys for Amicus Curiae

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